APPENDIX A — Opinion of the United States Court of Appeals for the Second Circuit, dated August 21, 1996

United States Court of Appeals

For the Second Circuit

No. 1905—August Term, 1995

(Argued: August 8, 1996 Decided: August 21, 1996)

Docket No. 96-1081

United States of America,

Appellee,

—v.—

John Doe,

Defendant-Appellant

Before: Meskill, Calabresi, and Parker,

Circuit Judges.

Appeal from an order of the United States District Court for the Eastern District of New York (Raggi, *J.*) reducing defendant's prison term from sixteen to eleven years pursuant to the government's Rule 35(b) motion. Appeal dismissed.

James O. Druker, Kase and Druker,
(Paula Schwartz Frome, Of Counsel),
for Defendant-Appellant.

Zachary W. Carter, U.S. Attorney, E.D.N.Y.,
(Susan Corkery, Eric D. Bernstein, Of Counsel),
for Appellee.

PER CURIAM:

On June 24, 1992, Doe pleaded guilty to a one-count indictment charging him with conspiracy to possess with intent to distribute cocaine in violation of 21 U.S.C. §§ 841(b)(1)(A), 846. On November 6, 1992, the district court sentenced Doe to a sixteen-year term of imprisonment. After his guilty plea, Doe began to cooperate with the government. On October 18, 1993, the government filed a motion to reduce Doe's sentence under Fed. R. Crim. P. 35(b). Such a motion filed by the government within one year of the imposition of the original sentence allows the district court to reduce the sentence for substantial assistance rendered to the government after sentencing. The parties do not contest that Doe provided significant assistance, personally and through third-party intermediaries, both before the submission of the motion and for two years following it. On January 19, 1996, the court reduced Doe's sentence from sixteen to eleven years based on the 35(b) motion. Doe appeals the extent of that reduction.

The defendant's appeal raises a question of first impression in this circuit—whether an appeal from a 35(b) motion is governed by 18 U.S.C. § 3742 (which confers limited appellate jurisdiction over appeals of otherwise final sentences) or by 28 U.S.C. § 1291 (which grants broad appellate jurisdiction over appeals of final decisions of district courts). We find that § 3742 applies. Because the defendant's appeal does not fall within the narrow appellate jurisdiction

provided for by that statute, we dismiss the appeal for lack of jurisdiction.

As an initial matter, we note that other circuits have split on this issue. The First Circuit has held that § 1291 governs an appeal of a 35(b) motion, *United States v. McAndrews*, 12 F.3d 273 (1st Cir. 1993), while the Fourth, Ninth, and Eleventh Circuits have held that § 3742 applies, *United States v. Pridgen*, 64 F.3d 147 (4th Cir. 1994); *United States v. Arishi*, 54 F.3d 596 (9th Cir. 1995); *United States v. Chavarria-Herrara*, 15 F.3d 1033 (11th Cir. 1994) The First Circuit rested its holding solely on the fact that "an order resolving a Rule 35(b) motion... is not, properly speaking, a sentence," because "a sentence must already have been imposed before Rule 35(b) can be invoked and a sentence reduction contemplated." *McAndrews*, 12 F.3d at 277. The Eleventh Circuit, however, found the First Circuit's reasoning "unpersuasive," stating that: "We have noted before that modification of a sentence is part of the sentencing process." *Chavarria-Herrara*, 15 F.3d at 1035-36 (citation omitted).

Both positions are, in a literal sense, possible. We do not believe that the question of whether a reduction of a sentence under Rule 35(b) is a sentence or a judgment can be adequately resolved by analyzing its text in a vacuum. Our finding that § 3742 applies to appeals of rule 35(b) motions is predicated instead on the similarity between Rule 35(b) and § 5K1.1 of the Sentencing Guidelines.

This circuit has found that "[t]he only practical difference between Rule 35(b) and U.S.S.G. § 5K1.1 is a matter of timing: [§ 5K1.1] is based on substantial assistance before sentencing while [Rule 35(b)] is based on substantial

assistance after sentencing." *United States v. Gangi*, 45 F.3d 28, 30 (2d Cir. 1995) (citation omitted). It is settled in this circuit that appeals of § 5K1.1 orders are governed by § 3742. See *United States v. Lawal*, 17 F.3d 560, 562 (2d Cir. 1994). We have been given no reason why Rule 35(b) motions should be governed by a different standard. On the contrary, allowing a 35(b) motion to be governed by the more lenient requirements of § 1291 would "have the deleterious effect of encouraging defendants to postpone their assistance to the Government to manipulate the timing of the motion in order to receive a more favorable standard of review." *Pridgen*, 64 F.3d at 149.

Having determined that § 3742 applies, we must consider whether that statute's narrow grant of jurisdiction allows us to hear the appeal in the instant case. We have § 3742 to cases in which the sentence imposed was "(1) in violation of the law; (2) a misapplication of the Guidelines; (3) an upward departure from the Guidelines; or (4) a plainly unreasonable penalty for an offense not included in the Guidelines." *Lawal*, 17 F.3d at 562; see 18 U.S.C. § 3742(a). The case before us does not fall under any of these exceptions.

Because we find that § 3742 governs appeals of 35(b) motions, and that the defendant's appeal does not fall within the limited jurisdiction conferred by § 3742, we dismiss the appeal for want of jurisdiction.

APPENDIX B — STATUTORY PROVISIONS

§ 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

3742. Review of a sentence

(a) Appeal by a defendant.—A defendant may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines; or

(3) is greater than the sentence specified in the applicable guideline range to the extent that the sentence includes a greater fine or term of imprisonment, probation, or supervised release that the maximum established in the guideline range, or includes a more limiting condition of probation or (b)(11) than the maximum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

(b) Appeal by the Government.—The Government, may file a notice of appeal in the district court for review of an otherwise final sentence if the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is less than the sentence specified in the applicable guideline range to the extent that the sentence includes a lesser fine or term of imprisonment, probation, or supervised release than the minimum established in the guideline range, or includes a less limiting condition of probation or supervised release under section 3563(b)(6) or (b)(11) than the minimum established in the guideline range; or

(4) was imposed for an offense for which there is no sentencing guideline and is plainly unreasonable.

The Government may not further prosecute such appeal without the personal approval of the Attorney General, the Solicitor General, or a deputy solicitor general designated by the Solicitor General.

(c) Plea agreements.—In the case of a plea agreement that includes a specific sentence under rule 11(e)(1)(C) of the Federal Rules of Criminal Procedure—

(1) a defendant may not file a notice of appeal under paragraph (3) or (4) of subsection (a) unless the sentence

imposed is greater than the sentence set forth in such agreement; and

(2) the Government may not file a notice of appeal under paragraph (3) or (4) of subsection (b) unless the sentence imposed is less than the sentence set forth in such agreement.

(d) Record on review.—If a notice of appeal is filed in the district court pursuant to subsection (a) or (b), the clerk shall certify to the court of appeals—

(1) that portion of the record in the case that is designated as pertinent by either of the parties;

(2) the presentence report; and

(3) the information submitted during the sentencing proceeding.

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and is unreasonable, having regard for

(A) the factors to be considered in imposing a sentence, as set forth in chapter 227 of this title; and

(B) the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and shall give due deference to the district court's application of the guidelines to the facts.

(f) Decision and disposition.—If the court of appeals determines that the sentence—

(1) was imposed in violation of law or imposed as result of a incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) is outside of the applicable guideline range and is unreasonable or was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further

sentencing proceedings with such instructions as the court considers appropriate;

(3) is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Application to a sentence by a magistrate.—An appeal of the otherwise final sentence imposed by a United States magistrate may be taken to a judge of the district court, and this section shall apply (except for the requirement of approval by the Attorney General or the Solicitor General in the case of a Government appeal) as though the appeal were to a court of appeals from a sentence imposed by a district court.

(h) Guideline not expressed as a range.—For the purpose of this section, the term "guideline range" includes a guideline range having the same upper and lower limits.

Rule 35. Correction or Reduction of a Sentence

(b) Reduction of Sentence for Changed Circumstances. The court, on motion of the Government made within one year after the imposition of the sentence, may reduce a sentence to reflect a defendant's subsequent, substantial assistance in the investigation or prosecution of another person who has committed an offense, in accordance with the guidelines and policy statements issued by the Sentencing Commission pursuant to section 994 of title 28, United States Code. The court may consider a government motion to reduce a sentence made one year or more after imposition of the sentence where the defendant's substantial assistance involves information or evidence not known by the defendant until one year or more after imposition of sentence. The court's authority to reduce

a sentence under this subsection includes the authority to reduce such sentence to a level below that established by statute as a minimum sentence.